United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Signed

76-6082

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

UNITED STATES OF AMERICA and FRANCIS T. BRADY,
Special Agent of the Internal Revenue Service,

Petitioners-Appellees

v.

P/S

B & E PAVING COMPANY and JOSEPH BARTONE,
Partner in B & E Paving Company,

Respondents-Appellants

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

SCOTT P. CRAMPTON,
Assistant Attorney General,

GILBERT E. ANDREWS,
CARLETON D. POWELL,
WYNETTE J. HEWETT,
Attorneys,
Tax Division,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:

DAVID G. TRAGER,
United States Attorney.

DAVID W. McMORROW,
Assistant United States Attorney.

TABLE OF CONTENTS

CITATIONS

Cases:

Page

Cases (continued):

Miscellaneous:

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76-6082

UNITED STATES OF AMERICA and FRANCIS T. BRADY,
Special Agent of the Internal Revenue Service,

Petitioners-Appellees

v.

B & E PAVING COMPANY and JOSEPH BARTONE,
Partner in B & E Paving Company,

Respondents-Appellants

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

STATEMENT OF THE ISSUE PRESENTED

Whether the District Court properly held that a partner may not invoke his Fifth Amendment privilege against self-incrimination as a ground for refusing to produce the financial records of the partnership.

STATEMENT OF THE CASE

On December 2, 1975, the United States and Francis T. Brady, Special Agent of the Internal Revenue Service, instituted this action for the purpose of enforcing a summons issued to B & E Paving Company (a partnership) and Joseph Bartone, a

partner, requesting the financial records of the partnership for the taxable year 1972. (R. iv, A-5.)[1/] On March 12, 1976, the United States District Court for the Eastern District of New York (Judge Weinstein) ordered enforcement of the summons. (R. iv, A-20--A-22.) On May 7, 1976, respondent filed a notice of appeal. (R. iv, A-23.) Jurisdiction is conferred upon this Court by 28 U.S.C., Section 1291.

The facts relevant to this appeal may be summarized as follows:

In May, 1975, Special Agent Francis T. Brady was assigned to investigate the tax liabilities of Joseph Bartone (respondent). (R. A-30, A-32.) On August 11, 1975, Brady issued a summons to respondent, as a partner in B & E Paving Company, requesting (R. A-5):

> All books, records, doucments [sic] and papers in * * * [his] possession or control belonging to B & E Paving Co., which will enable a representative of the Internal Revenue Service to verify the accuracy of the Form 1065 (Partnership) return filed by B & E Paving Co., for the year 1972 * * *. 2/

1/ "R." references are to the separately bound record appendix.

2/ At the hearing, it became clear that the records in respondent's possession included work papers relating to the partnership prepared by an accountant. The District Court ordered that these papers be produced. Respondent only discusses the records of the partnership and apparently does not contest the District Court's order with respect to the work papers. Clearly, such an argument would be fruitless in light of Fisher v. United States, 44 U.S. Law Week 4514 (Sup. Ct., Apr. 21, 1976).

Upon refusal to produce the financial records relating to the partnership return, this action was instituted to enforce the summons. (R. A-2--A-3.)

In the court below, respondent sought to avoid compliance with the summons on two grounds: (1) that the summons was issued in bad faith, and (2) that enforcement of the summons would violate his Fifth Amendment privilege against self-incrimination. (R. A-27--A-28.) At the hearing on these issues, the special agent testified that (R. A-30) he had been assigned to this case to determine respondent's tax liability, that (R. A-31) the records were necessary to determine that liability, and that (R. A-52--A-53) he had reached no conclusion regarding whether to recommend criminal prosecution. Accordingly, the District Court found (R. A-92) that the summons was issued in good faith and prior to a recommendation for criminal prosecution. Respondent does not contest these findings on appeal.

With respect to the second issue, respondent introduced the testimony of Gerald Kaufman (R. A-65--A-76), the accountant whose services were used by the partnership. He testified that (R. A-66) he maintained B & E Paving Company's records from May, 1971, until Septemter, 1973;[3/] that (R. A-65) he posted cash receipts and

---

3/ He was employed from the inception of the partnership to its dissolution. (R. A-67--A-69.)

disbursements in the partnership books,[4/] prepared payroll taxes, partnership tax returns, as well as the partners' individual returns; and that (R. A-67) the books and records were generally kept at the home of respondent's partner, but on occasions respondent carried the payroll book or checkbook in his car and would deliver the books and records to the accountant. On cross-examination, the accountant stated that he worked at his own office and was not present on a daily basis to observe the operations of the partnership, but that he was familiar with the organization of the business. (R. A-71--A-72.) He further testified that when the partnership was dissolved, respondent retained the books and records of the partnership and undertook to pay the debts of the partnership.

Based on this testimony and the partnership certificate, the District Court found that B & E Paving Company was a formally organized partnership under the laws of the State of New York, that it owned substantial property, entered purchase agreements, and borrowed funds as a partnership, and that the

---

4/ The accountant stated that appellant's former sister-in-law occasionally made entries on the partnership books and records. (R. A-72--A-73.)

partnership books and records were posted primarily by an independent accountant and not an employee. (R. A-97, A-98, A-102; Deft. Ex. B.) Accordingly, the District Court held that respondent was not entitled to avoid the production of the partnership's financial records and the accountant's workpapers on the basis of his personal privilege against self-incrimination.[5/] (R. A-98--A-99, A-101.)

This appeal followed.

5/ At respondent's request, the District Court granted a stay of its order enforcing the summons during the pendency of this appeal, on the condition that respondent agree to extend the limitations period for making assessments of his 1971 and 1972 tax liabilities. (R. A-103--A-106.)

SUMMARY OF ARGUMENT

An individual may not rely upon the Fifth Amendment privilege against self-incrimination to avoid producing the business records of a collective entity which are in his possession in a representative capacity, even if the records might incriminate him personally. This rule applies with respect to the financial records of a partnership where the partnership is formally organized, even though it is small. The business entity has no Fifth Amendment privilege against self-incrimination and an individual may not assert his personal privilege against self-incrimination to insulate such records from production.

The present records can be only characterized as the business records of the partnership and not respondent's personal records. They consisted of documents reflecting the financial activities of the entity. Contrary to respondent's contention that the partnership was an informal entity, the District Court found that it was a formally organized partnership. This finding is totally consistent with the record. It is clear then that the production of the partnership's records involves no prohibited compulsion of testimonial communication within the meaning of the Fifth Amendment.

ARGUMENT

THE DISTRICT COURT PROPERLY HELD THAT A PARTNER MAY NOT INVOKE HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AS A GROUND FOR REFUSING TO PRODUCE THE FINANCIAL RECORDS OF THE PARTNERSHIP

The constitutional privilege against self-incrimination contained in the Fifth Amendment of the United States Constitution prevents "a person only against being incriminated by his own compelled testimonial communication" and is not "violated by the fact alone that the papers on their face might incriminate" him. Fisher v. United States, 44 U.S. Law Week 4514, 4520 (Sup. Ct., Apr. 21, 1976). See also, Andresen v. Maryland, 44 U.S. Law Week 5125, 5127-5130 (Sup. Ct., June 29, 1976); In re Horowitz, 482 F. 2d 72, 86 (C.A. 2, 1973), cert. denied, 414 U.S. 867 (1973), rehearing denied, 414 U.S. 1052 (1973). In this regard, it has been long established that an individual cannot rely upon the privilege to avoid producing the business records of a collective entity which are in his possession in a representative capacity, even if the records might incriminate him personally. For example, an officer of a corporation may not claim his privilege against compulsory self-incrimination to justify his refusal to produce corporate books and records. Wilson v. United States, 221 U.S. 361 (1911). This rule applies even though the corporation has been dissolved. Wheeler v. United States, 226 U.S. 478 (1913); Grant v. United States, 227 U.S. 74 (1913). The same rule is applicable to officers of unincorporated associations. United States v. White, 322 U.S. 694, 699-700 (1944) (labor union); Rogers v. United States, 340 U.S. 367, 371-372 (1951) (Communist

Party of Denver); McPhaul v. United States, 364 U.S. 372, 380 (1960) (Civil Rights Congress). In short, the privilege against self-incrimination is limited to the function of protecting only a natural individual from producing his own testimony or personal records. Fisher v. United States, supra, p. 4520.[6/]

In this case, respondent seeks to avoid the production of the financial records of a partnership, B & E Paving Company, on the basis of his personal privilege against self-incrimination. This he cannot do. With respect to the financial records of a partnership, the Supreme Court has held that a partner may not avoid their production where the partnership is formally organized, even though it is a small partnership. Bellis v. United States, 417 U.S. 85 (1974). Such a business entity has no privilege against self-incrimination to avoid producing its record, and it follows that an individual acting on behalf of the organization may not take advantage of his personal privilege to avoid producing them. Id., p. 90.

As respondent apparently concedes, the documents sought are the business records of the partnership.

6/ Respondent does not contend that the act of production will incriminate him, even though, in other circumstances such an act could raise a concern. See Fisher v. United States, supra, p. 4520. There is no suggestion that the possession of the records of the partnership would incriminate the possessor-claimant and the fact of his possession is not in issue.

Without acknowledging the District Court's finding (R. A-96--A-97) that B & E Paving Company was a formally organized partnership, respondent, however, argues (Br. 8-9) that the partnership was "informally organized" and that United States v. Slutsky, 352 F. Supp. 1105 (S.D. N.Y., 1972), is controlling here, rather than Bellis, supra. This argument in turn is based upon the notion that the Supreme Court approved Slutsky in its opinion in Bellis. In the final paragraph of its opinion in Bellis, the Court stated (id., p. 101):

> This might be a different case if it involved a small family partnership, see United States v. Slutsky, 352 F. Supp. 1105 (SDNY 1972); In re Subpoena Duces Tecum, 31 F. Supp., at 421, or, as the Solicitor General suggests, * * * if there were some other pre-existing relationship of confidentiality among the partners. (Emphasis supplied.)

Initially, it is readily apparent that the Supreme Court declined in Bellis to reach the issue of the scope of the Fifth Amendment privilege in the context of a small family partnership or where there was some pre-existing relationship of confidentiality between the partners. Assuming that the Court would have reached a different result under the circumstances it noted, neither of the circumstances is presented here. This case does not involve a small family partnership,

nor has respondent pointed to any pre-existing relationship of confidentiality between himself and his partner.[7/] Thus, it is

---

7/ Respondent asserts (Br. 10) that the availability of the Fifth Amendment privilege should not depend upon "the consanguinity of the individuals involved." Of course, the Supreme Court's comment in Bellis was directed to a family relationship or some other relationship of confidentiality. The difficulty with respondent's statement is that he has failed to demonstrate any relationship between the partners which would be recognized as confidential.

Furthermore, even if B & E Paving were a small family partnership, as that term is used in Bellis, we doubt that that fact should confer a privilege on respondent to avoid producing otherwise unprivileged partnership records. Whether or not a partnership is a small family partnership would not appear to have any bearing on the criteria (permanent or temporary character of the business conducted by an organization, existence or absence of organizational structure, and treatment of the organization as a separate entity or not) enunciated in Bellis for determining whether an organization possesses an established institutional identity independent of its individual members. See Gordon v. Commissioner, 63 T.C. 51, 71 (1974), revised, 63 T.C. 501 (1975), appeals pending (C.A. 9, Nos. 75-2567 and 75-2960); Comment, Bellis v. United States; Denial of Fifth Amendment Protection of Partnerships, 39 Albany L. Rev. 545, 556-557 (1975). Recent Developments, Bellis v. United States--Constitutional Law--Fifth Amendment--derogation of fifth amendment as it pertains to documents of organized entities. 417 U.S. 85 (1974), 3 Hofstra L. Rev. 467, 482-483 (1975). Indeed, the basic irrelevancy of the family status of any partnership to these criteria may have been recognized by the Supreme Court's citation of Bellis in a recent decision (Fisher v. United States, 44 U.S. Law Week 4514, 4520 (Apr. 21, 1976)) for the unqualified proposition that neither a partnership nor the individual partners are shielded from compelled production of partnership records on self-incrimination grounds. In any event, it would appear that a partner's invocation of his Fifth Amendment privilege against self-incrimination under the facts of United States v. Slutsky, 352 F. Supp. 1105 (S.D. N.Y., 1972), and In re Subpoena Duces Tecum, 81 F. Supp. 418 (N.D. Calif., 1948) (both referred to in Bellis (417 U.S., p. 101)) would, like the invocation of the privilege in Boyd v. United States,

apparent that the Supreme Court's statement in Bellis has no application in this case. See also, United States v. Mahady & Mahady, 512 F. 2d 521 (C.A. 3, 1975); United States v. Kuta, 518 F. 2d 947 (C.A. 7, 1975), cert. denied, 44 U.S. Law Week 3344 (Sup. Ct., Dec. 8, 1975). In this respect, respondent's contention (Br. 8, 10) that the District Court misapplied one of the tests indicated in United States v. White, supra, pp. 699-700, viz., that the entity has a character so personal that it only can be said to embody purely private interests, is misdirected. While United States v. White rejected any claim of privilege in a situation of the financial records of a large organization (labor union), Bellis v. United States, supra, pp. 94-97, made it plain that the same principle applied to small business entities. See also, United States v. Silverstein, 314 F. 2d 789, 791 (C.A. 2. 1963). The test to be applied is whether the records demanded can be fairly characterized as the records of an organization (or third party) rather than the personal records of an individual. Bellis v. United States, supra, p. 93; Fisher v. United States, supra.

7/ (continued)
116 U.S. 616 (1886), not be sustained today, at least where the records sought are the partnership's business records. See Fisher v. United States, 44 U.S. Law Week, pp. 4520, 4521-4522, 4525 and fn. 7, 4528; Andresen v. Maryland, supra, pp. 5128-5129. Compare the comments of Judge Weinstein questioning the validity of Slutsky. (R. A-94.)

Concerning this crucial question, the District Court concluded that B & E Paving Company was a formally organized partnership. (R. A-96--A-97.) It filed a certificate of business in the partnership name. (Deft. Ex. 1.) It entered purchase agreements and borrowed funds as a business entity. (R. A-96--A-97.) It hired employees and employed an accountant to maintain its records. It also held itself out to the Government as a partnership by filing partnership tax returns. (R. A-96--A-97.) In all relevant matters, then, the business entity had held itself out as a partnership to the business community and to the Government. Under the circumstances, the District Court's finding cannot be regarded as erroneous and the rule stated in Bellis is controlling.

Respondent finally contends (Br. 12-13) that, even if this Court should find that there was a formal partnership while the partnership was in existence, an "expectation of privacy" arose on its dissolution which would justify his refusal to produce the documents.[8/] Of course, respondent ignores that Bellis v. United States, supra, involved the records of a dissolved

8/ Respondent filed an affidavit (R. A-14--A-17) in opposition to the petition to enforce the summons in which he stated that upon the dissolution of the partnership he undertook to pay the debts of the partnership and in consideration received personal ownership of the records. The naked concepts of legal ownership are not controlling. For instance, in United States v. Mahady & Mahady, supra, it was uncontested that the sole surviving partner was the owner, as the surviving partner. See also Andresen v. Maryland, supra. Moreover, respondent did not testify at the hearing, and his statements were not subject to cross-examination. The District Court was entitled to reject

partnership. See United States v. Mahady & Mahady, supra (death of other partners); United States v. Silverstein, supra (one partnership had been dissolved); see also, Wheeler v. United States, supra; Grant v. United States, supra. As the Supreme Court observed in Bellis, the dissolution of the partnership gives the individual no greater claim to the privilege. Id., p. 96, fn. 3. Furthermore, whatever relevancy respondent's "expectation of privacy" may have in anaylyzing his rights under the Fifth Amendment (see In re Horowitz, supra, pp. 84-86; Fisher v. United States, supra, p. 4517), this relevancy, at most, arises when the documents may be described as the personal records of the claimant. It seems grotesque to suggest that financial records of a partnership, which record the relationship between the entity and the business community, are held with an expectation of privacy comparable to the private non-business records of an individual. See United States v. Beattie, 522 F. 2d 267, 276 (C.A. 2, 1975), cert. denied on this issue, 44 U.S. Law Week 3659 (Sup. Ct., May 19, 1976), vacated and remanded on other grounds, 44 U.S. Law Week 3658 (Sup. Ct., May 19, 1976), on remand C.A. 2, No.

8/ (continued)
the statements in the affidavit. Federal Rules of Civil Procedure, Rule 43(e); See, 4A Moore's Federal Practice, (2d ed.), par. 36.09, p. 36-86.

75-6041. Thus, when a partnership is dissolved, it cannot be said that the records reflecting the partnership affairs metamorphosed into the private records of either one or both of the parties. See Bellis v. United States, supra, pp. 95-100, discussing the nature of partnership records. Compare Fisher v. United States, supra, pp. 4521-4522 (Judge Brennan, concurring).

In short, if respondent is to succeed in his claim that he may avoid production of the records on the basis of his Fifth Amendment privilege, he must show that he is being incriminated by his own compelled testimonial communication. His compliance with the summons, however, does not involve any testimonial communication by him within the prohibitions contained in the Fifth Amendment. Cf. Fisher v. United States, supra, p. 4520.

CONCLUSION

For the foregoing reasons the order of the District Court is correct and should be affirmed.

Respectfully submitted,

SCOTT P. CRAMPTON,
Assistant Attorney General,

GILBERT E. ANDREWS,
CARLETON D. POWELL,
WYNETTE J. HEWETT,
Attorneys,
Tax Division,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:

DAVID G. TRAGER,
United States Attorney,

DAVID W. McMORROW,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing brief has been made on opposing counsel by mailing four copies thereof on this 26th day of August, 1976, in an envelope, with postage prepaid, properly addressed to him as follows:

Stephen C. Silverberg, Esquire
Bandler and Kass
605 Third Avenue
New York, New York 10016

Gilbert E. Andrews/enk
GILBERT E. ANDREWS,
Attorney.